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4 HENRY DILLIHANT,  
5 Plaintiff,  
6 v.  
7 CENTER FOR HUMAN DEVELOPMENT,  
8 et al.,  
9 Defendants.

10 Case No. 16-cv-00220-JSC

11 **ORDER GRANTING DEFENDANT  
CONTRA COSTA COUNTY'S MOTION  
TO DISMISS**

12 Re: Dkt. Nos. 14, 19, 21

13 Plaintiff Henry Dillihant III (“Plaintiff”) makes various civil claims against Defendants  
14 Contra Costa County (the “County”) and the Center for Human Development arising out of his  
15 employment termination. Now pending before the Court is the County’s Motion to Dismiss  
16 Plaintiff’s FAC. (Dkt. No. 14.) The County seeks dismissal of four of Plaintiff’s causes of actions  
17 with prejudice, arguing that they cannot be rectified by adding additional allegations. Having  
18 considered the parties’ written submissions, and, having had the benefit of oral argument on June  
19 30, 2016, the Court GRANTS the County’s Motion, but with leave to amend except for the “Paid  
20 Family Leave” claim which is dismissed with prejudice.<sup>1</sup>

21 **FACTUAL & PROCEDURAL BACKGROUND**

22 **I. Complaint Allegations**

23 Plaintiff is a resident of Contra Costa County and was jointly employed by the Center for  
24 Human Development and the County.<sup>2</sup> (FAC ¶¶ 3, 6.) Plaintiff was employed for approximately  
25 six months, from on or around July 2014 to on or around January 2015. (*Id.* ¶ 6.) Plaintiff worked

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27 <sup>1</sup> All parties have consented to the jurisdiction of a magistrate judge pursuant to 28 U.S.C. §  
28 636(c). (Dkt. Nos. 6, 11, 12.)

<sup>2</sup> Claims asserted against the Center for Human Development are not at issue in this Motion.

1 as an independent contractor for the County as a health conductor for the County's Health  
2 Services Department. (*Id.*) The County is a public entity. (*Id.* ¶ 5.)

3 Throughout his employment, Plaintiff's direct supervisor, Ms. Mashama, repeatedly made  
4 inappropriate and discriminatory comments to Plaintiff. (*Id.* ¶ 8.) Ms. Mashama's comments  
5 referenced her concerns that Plaintiff would possibly make mistakes, disappear, or fail because of  
6 his race and gender. (*Id.*) Plaintiff and his wife were expecting a child in February 2015; after his  
7 wife experienced some complications he requested time off. (*Id.* ¶ 9.) Both the County and the  
8 Center for Human Development denied his request for leave. (*Id.*) When Plaintiff nonetheless  
9 took time off to assist his wife, the County marked him absent without official leave. (*Id.*) After  
10 his child was born, he again requested time off, but this request was also denied and met with  
11 hostility. (*Id.* ¶ 10.) Further, both the County and the Center for Human Development gave  
12 Plaintiff false information regarding his right to take time off. (*Id.*) Shortly thereafter, Plaintiff  
13 was terminated by the County and the Center for Human Development. (*Id.* ¶ 12).

14 On his final day with the County, Plaintiff was "accosted" by the County's deputies and  
15 "paraded through the halls in open view . . . with his hands behind his back as if he were under  
16 arrest." (*Id.* ¶ 13.) The County deputies searched both his person and possessions without a  
17 warrant or his permission and treated Plaintiff in a hostile manner, with their weapons drawn or in  
18 plain sight, making it known to Plaintiff that he was not free to leave. (*Id.* ¶¶ 13-14.) While he  
19 was "under arrest," the County deputies searched his vehicle and, in doing so, they caused  
20 extensive damage to it and the property inside. (*Id.* ¶ 15.) Specifically, the County deputies  
21 poured laundry detergent over Plaintiff's belongings inside the vehicle, including his bible, which  
22 deeply offended him as he is a pastor. (*Id.*) Plaintiff incurred a substantial car repair bill because  
23 of the County deputies' actions. (*Id.*) The County seized Plaintiff's personal property from his  
24 desk and vehicle and refused to return it. (*Id.* ¶ 16.) Additionally, the Center for Human  
25 Development refused to give Plaintiff a reason for his termination or access to his personnel file,  
26 although Plaintiff believes that it was based on his request for time off and for seeking information  
27 on taking leave. (*Id.* ¶¶ 18, 21.)

1           **II. Procedural Background**

2           Plaintiff exhausted his administrative remedies with the Department of Fair Employment  
3 and Housing (“DFEH”) prior to filing this action against the County and the Center for Human  
4 Development. (Dkt. No. 1; FAC ¶ 19.) After this action was filed, Plaintiff amended his DFEH  
5 complaint to state a claim for associational discrimination, and thereafter filed the now operative  
6 FAC. (FAC ¶ 19.)

7           Plaintiff brings eight causes of action in the FAC: (1) violations of the Unemployment  
8 Insurance Code § 1237 and Labor Code § 98.6 against both Defendants for  
9 discrimination/retaliation of Paid Family Leave; (2) discrimination based on race and gender in  
10 violation of the Fair Employment and Housing Act (“FEHA”) against both Defendants; (3)  
11 discrimination based on disability in violation of FEHA against both Defendants; (4) wrongful  
12 termination in violation of public policy against the Center for Human Development; (5) violation  
13 of California Labor Code § 1198.5 against the Center for Human Development; (6) violation of 42  
14 U.S.C. § 1983 against the County (for civil rights violations by the County deputies); (7)  
15 intentional infliction of emotional distress (“IIED”) against both Defendants; and (8) conversion  
16 against the County. Plaintiff seeks damages and injunctive relief.

17           The County now moves the Court to Dismiss Plaintiff’s FAC pursuant to Rule 12(b)(6) of  
18 the Federal Rules of Civil Procedure. (Dkt. No. 14.) The Center for Human Development  
19 answered the FAC and did not move to dismiss. (Dkt. No. 15.)

20           **DISCUSSION**

21           The County moves to dismiss four of the six causes of action Plaintiff alleges against it;  
22 that is, all but the race, gender, and disability discrimination claims. The County contends that  
23 Plaintiff’s first cause of action for discrimination/retaliation for “paid family leave” fails to state a  
24 claim for relief because Plaintiff does not qualify as an employee under either the federal Family  
25 and Medical Leave Act or California’s Family Rights Act. The County next insists that Plaintiff  
26 has not adequately pled *Monell* liability in the sixth cause of action. Finally, the County urges that  
27 Plaintiff has failed to state a claim for either IIED in his seventh cause of action because he does  
28 not allege facts demonstrating “extreme and outrageous conduct” or for conversion in his eighth

1 cause of action because the FAC does not allege facts to show that Plaintiff owned, or had a right  
2 to possess, any particular item of personal property.

3 **A. Plaintiff's Discrimination and Retaliation in "Paid Family Leave" Claim**

4 Plaintiff expressly does not oppose the County's motion to dismiss his first cause of action  
5 for discrimination and retaliation for "paid family leave." (Dkt. No. 19 at 1.<sup>3</sup>) Accordingly, the  
6 Court grants the motion to dismiss this claim with prejudice.

7 **B. Plaintiff's Section 1983 Claim**

8 The County argues that Plaintiff has failed to state a claim of municipal liability under  
9 *Monell v. Dep't of Social Servs. of the City of New York*, 436 U.S. 658, 694 (1978). Plaintiff's  
10 opposition seeks leave to amend this claim. (Dkt. No. 19 at 1.) Accordingly, the Court grants the  
11 motion to dismiss the sixth cause of action with leave to amend.

12 **C. Plaintiff's IIED Claim Fails to Establish the Required Elements**

13 To adequately plead a claim for IIED, a plaintiff must allege four elements: "(1)  
14 outrageous conduct by the defendant, (2) intention to cause or reckless disregard of the probability  
15 of causing emotional distress, (3) severe emotional suffering, and (4) actual and proximate  
16 causation of the emotional distress." *Dowell v. Contra Costa Cnty.*, 928 F. Supp. 2d 1137, 1156  
17 (N.D. Cal. 2013) (citing *Cole v. Fair Oaks Fire Prot. Dist.*, 43 Cal. 3d 148, 156 n.7 (1987)). "In  
18 order to be considered outrageous, the conduct 'must be so extreme as to exceed all bounds of that  
19 usually tolerated in a civilized community.'" *Tekle v. United States*, 511 F.3d 839, 855 (9th Cir.  
20 2007) (quoting *Davidson v. City of Westminster*, 32 Cal. 3d 197, 209 (1982)). Further, the  
21 severity must be "of such substantial quantity or enduring quality that no reasonable man in a  
22 civilized society should be expected to endure it." *Fletcher v. W. Nat'l Life Ins. Co.*, 10 Cal. App.  
23 3d 376, 397 (1970). Demonstrating severity of distress includes pleading facts to show the nature,  
24 extent or duration of the alleged emotional distress. *See Angie M. v. Super. Ct.*, 37 Cal. App. 4th  
25 1217, 1227 (1995).

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<sup>3</sup> Record citations are to material in the Electronic Case File ("ECF"); pinpoint citations are to the  
ECF-generated page numbers at the top of the documents.

1       An employer's conduct cannot be said to be extreme or outrageous for purposes of an IIED  
2 claim when the conduct is "a normal part of the employment relationship, such as demotions,  
3 promotions, criticism of work practices, and frictions in negotiations as to grievances." *Cole*, 43  
4 Cal. 3d at 160. Under California law, "[a] simple pleading of personnel management activity is  
5 insufficient to support a claim of intentional infliction of emotional distress, even if improper  
6 motivation is alleged." *Janken v. GM Hughes Elecs.*, 46 Cal. App. 4th 55, 80 (1996). In addition,  
7 the defendant must have acted intending to cause the injury or acted knowing that the injury will  
8 result. *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 1001 (1993); *see also Christensen v.*  
9 *Super. Ct.*, 54 Cal. 3d 868, 904-05 (1991) (noting that the defendant's conduct must be "especially  
10 calculated to cause . . . mental distress of a very serious kind."). This conduct does not include a  
11 supervisor yelling at or criticizing an employee. *See Schneider v. TRW*, 938 F.2d 986, 992 (9th  
12 Cir. 1991). Even though conduct of this sort might be immoral or depraved, it is part of normal  
13 employment practices. *Id.*

14       Plaintiff's IIED cause of action does not identify any specific acts that constitute extreme  
15 and outrageous conduct. Instead, he incorporates his other factual allegations by reference and  
16 concludes that these acts were "outrageous, unnecessary, excessive and unwarranted" and done  
17 with a "reckless disregard." (FAC at ¶¶ 56-57.) In his opposition, Plaintiff identifies particular  
18 FAC paragraphs to support his IIED claim: (1) the County "intentionally" created a spectacle out  
19 of his termination to make it appear as though he were a criminal by parading him through the  
20 hallways "with his hands behind his back as if he were under arrest" (FAC ¶ 13); (2) the County  
21 deputies' search of Plaintiff's person and belongings without permission or explanation and their  
22 hostile treatment towards Plaintiff, with their weapons drawn or exposed (FAC ¶ 14); and (3) the  
23 County deputies' search of Plaintiff's vehicle without a warrant or permission and intentionally  
24 destroying his property in the commission of the search (FAC ¶ 15).

25       At a minimum, Plaintiff's factual allegation regarding the deputies intentionally pouring  
26 laundry detergent over his property in his car while conducting an illegal search supports a  
27 plausible inference of conduct that is outrageous, unnecessary, excessive, unwarranted, and so  
28 humiliating that "no reasonable man . . . should be expected to endure." (FAC ¶¶ 15.) *See*

1       *Fletcher*, 10 Cal. App. 3d at 397; *Tekle*, 511 F.3d at 855; *see also Crain v. Krehbiel*, 443 F. Supp.  
2 202, 212-13 (N.D. Cal. 1977) (holding that the defendant's verbal threats and intimidating conduct  
3 directed at plaintiff during conversations in the course of an investigation qualifies as extreme and  
4 outrageous conduct under California law).

5       This allegation also allows the Court to draw the inference that the County acted with  
6 reckless disregard of the probability that their conduct and acts would cause plaintiff severe  
7 emotional distress. *See Potter*, 6 Cal. 4th at 1001. Construing the allegations in the light most  
8 favorable to Plaintiff, as the Court must, *see Spewell v. Golden State Warriors*, 266 F.3d 979, 988  
9 (9th Cir. 2001), the deputies' actions constitute a reckless disregard of the probability that their  
10 conduct would cause Plaintiff severe emotional distress. (FAC ¶¶ 13-15, 57.) Even if the deputies  
11 were unaware of the bible in the car or unaware that Plaintiff is a pastor, unlawfully searching  
12 Plaintiff's vehicle and spilling laundry detergent over his property demonstrates reckless disregard  
13 toward the possibility of inflicting severe emotional distress upon Plaintiff. (FAC ¶ 15.) Although  
14 Plaintiff alleges that he was not present when the County deputies "intentionally" poured the  
15 detergent on his belongings (FAC ¶ 15), the unlawful search was directed at Plaintiff and is  
16 therefore sufficient to state an IIED claim. *See Cole*, 43 Cal. 3d at 159; *Christensen*, 54 Cal. 3d at  
17 903. Unlike *Potter*, here the deputies were aware of the specific victim and "had to have realized  
18 that [their] misconduct was almost certain to cause severe emotional distress." *See Potter*, 6 Cal.  
19 4th at 1003. Additionally, accepting Plaintiff's allegations as true, the search was so reckless that  
20 it resulted in destruction of Plaintiff's property. (FAC ¶ 15.)

21       While these allegations support an inference that the conduct was sufficiently outrageous  
22 and conducted with reckless disregard, Plaintiff has not adequately pled the severity of his  
23 resulting emotional distress. Merely stating that he was "deeply offended" is inadequate. (FAC ¶  
24 15.) "[D]iscomfort, worry, anxiety, upset stomach, concern, and agitation" are not severe enough  
25 to constitute emotional distress. *Hughes v. Pair*, 46 Cal. 4th 1035, 1051 (2009); *see also Wong v.*  
26 *Tai Jing*, 189 Cal. App. 4th 1354, 1376-77 (2010) (lost sleep, upset stomach, and general anxiety  
27 are not severe emotional distress). Plaintiff has thus failed to adequately allege the severity of any  
28 emotional distress that he might have suffered as a result of the County's conduct. The County's

1 motion to dismiss the IIED claim is therefore granted with leave to amend. As the County denies  
2 that Plaintiff was in its employ, the Court will not address its alternative workers compensation  
3 exclusivity argument.

4 **D. Plaintiff's Conversion Claim is not Sufficiently Pled**

5 Conversion is ““the wrongful exercise of dominion over the property of another.”” *Mindys*  
6 *Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 601 (9th Cir. 2010) (quoting *Oakdale Vill. Group v. Fong*,  
7 43 Cal. App. 4th 539, 543 (1996)). The elements of conversion under California law are: (1)  
8 ownership of, or a right to possess, the property at the time of the conversion; (2) the defendant’s  
9 conversion by a wrongful act or disposition of the plaintiff’s property rights; and (3) damages.  
10 *Farmers Ins. Exch. v. Zerin*, 53 Cal. App. 4th 445, 451 (1997). Conversion may be found even  
11 when a plaintiff voluntarily places his property in the defendant’s possession, as long as the  
12 defendant wrongfully “assume[s] control over the property or . . . ‘applie[s] the property to his  
13 own use.’” *Mindys Cosmetics*, 611 F.3d at 601 (quoting *Oakdale*, 43 Cal. App. 4th at 543). In  
14 other words, a plaintiff alleging conversion must prove that, at a certain point, “[he] did not  
15 consent to the defendant’s exercise of dominion” over the property. *Bank of N.Y. v. Fremont Gen.*  
16 *Corp.*, 523 F.3d 902, 914 (9th Cir. 2008) (citation omitted).

17 An action for conversion of tangible property exists when a plaintiff makes a claim for  
18 property that “is specific enough to be identified.” *Olschewski v. Hudson*, 87 Cal. App. 282, 288  
19 (1927); *see also Chappell v. United States*, 270 F.2d 274, 278 (9th Cir. 1959). Thus, a plaintiff  
20 must demonstrate “that he was entitled to the possession of the specific property in question,”  
21 giving the defendant notice of this specific property. *Fremont Indem. Co. v. Fremont Gen. Corp.*,  
22 148 Cal. App. 4th 97, 123 (2007) (internal citation and quotation marks omitted). Plaintiff’s  
23 conversion claim alleges that the County wrongfully deprived him of his “personal property” that  
24 was left at his desk and inside his vehicle. (FAC ¶¶ 15-16, 60-61.) However, Plaintiff’s claim is  
25 devoid of factual allegations and does not give notice to the County as to which specific items of  
26 personal property were taken. Plaintiff’s failure to identify the property purportedly seized renders  
27 his claim inadequately pled. *See Fremont Indem.*, 148 Cal. App. 4th at 123; *Perdue v. Rodney*  
28 *Corp.*, No. 13cv2712-GPC (BGS), 2014 WL 3726700, at \*10 (S.D. Cal. July 25, 2014) (finding

1 that because the “conversion allegations are specific enough to apprise [D]efendant of the  
2 substance of the claim asserted against [it]” the plaintiff adequately stated a claim of conversion)  
3 (internal citation and quotation marks omitted).

4 Accordingly, the Court grants the County’s motion to dismiss Plaintiff’s eighth cause of  
5 action with leave to amend.

6 **CONCLUSION**

7 The Court GRANTS the County’s Motion to Dismiss Plaintiff’s sixth, seventh, and eighth  
8 causes of action with leave to amend. The first cause of action is dismissed with prejudice.  
9 Plaintiff must file his second amended complaint, if he so chooses, within 14 days of this Order.

10 This Order disposes of Docket No. 14.

11 **IT IS SO ORDERED.**

12 Dated: July 5, 2016

13   
14 JACQUELINE SCOTT CORLEY  
15 United States Magistrate Judge